

*Not To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

TERRY R. RAYMOND,

Plaintiff,

vs.

U.S.A. HEALTHCARE  
CENTER-FORT DODGE, L.L.C., and  
the parent corporation U.S.A.  
HEALTHCARE, INC.,

Defendants.

No. C 05-3074-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING FURTHER  
MOTIONS IN LIMINE**

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This matter comes before the court pursuant to the following evidentiary motions: (1) the plaintiff's May 7, 2007, Third Motion In Limine (docket no. 46); and (2) the defendants' May 7, 2007, Motion In Limine Regarding Polygraph Evidence (docket no. 50). Both motions were filed, without leave, well past the deadline for such motions in Section XII of the March 5, 2007, Order Resetting Trial, Final Pretrial Conference, And Restating Requirements For Final Pretrial Order (docket no. 31). Nevertheless, in an attempt to make the trial go as smoothly as possible, the court decided to entertain the belated evidentiary motions and set a deadline at the end of the business day on May 8, 2007, for the parties to file their responses. The court will consider the belated evidentiary motions in turn.

In her May 7, 2007, Third Motion In Limine (docket no. 46), plaintiff Raymond seeks to exclude evidence of correspondence between the parties, and in particular

defendants' Exhibit Y, concerning discovery of records of other employees of U.S.A. Healthcare who had filed workers' compensation claims and their current employment statuses. Raymond has not submitted with her motion any exhibit marked Exhibit Y, but it appears that her Exhibit 1 attached to her motion is the exhibit she is seeking to exclude. Raymond represents that counsel for the parties conferred on several occasions, by telephone and e-mail, to resolve disputes about the scope and burdensomeness of production of pertinent employee records that Raymond had requested. She argues that evidence of any of that correspondence should not be used, even as rebuttal evidence, to vary the response that the defendants eventually provided to Interrogatory No. 9, concerning the same issue, where the correspondence reflects that Raymond's counsel had told the defendants that an adequate response to Interrogatory No. 9 might reduce or eliminate the request for production of employee files. She points out that the defendants never supplemented the interrogatory response, and the fact that she was willing to accept less than her discovery requests might have entitled her to receive in order to resolve the matter amicably, as indicated in Exhibit 1, should not be used to prejudice her case. She also argues that use of the e-mails between counsel is inappropriate, because it could require her counsel to appear as a witness and require her to put into evidence further correspondence between counsel concerning the matter. Next, she argues that the evidence in question should be excluded, because she requested the answer to Interrogatory No. 9 in an attempt to limit the documents that might need to be produced, and she relied on the answer to that interrogatory as complete, because it has never been supplemented. Finally, she argues that the defendants only belatedly disclosed the exhibit, by e-mail on April 28, 2007, not 21 days in advance of the trial, as required by the pertinent scheduling order, even though the defendants clearly knew about the e-mails and the discovery controversy over a year ago.

In their May 8, 2007, Resistance To Plaintiff's Third Motion In Limine (docket no. 56), the defendants argue that Exhibit Y (which they confirm is marked Exhibit 1 with Raymond's motion and now marked Exhibit R in the trial exhibit list, as the result of elimination of duplicate exhibits) is highly relevant to issues in this case and not prejudicial. The defendants contend that the exhibit shows an agreement between counsel concerning supplementation of the answer to Interrogatory No. 9, and that showing the correspondence between the attorneys is just as relevant as Raymond's Exhibit 18, which is the defendants' supplemental answer to Interrogatory No. 9, because it is the other side of the same coin. They also contend that the exhibit has been marked with the intent of avoiding the unfair prejudice and confusion or misleading the jury feared by Raymond. Therefore, the defendants contend that Raymond's motion should be denied.

One of Raymond's arguments appears to be that the evidence of correspondence between counsel concerning the discovery matter should be excluded as a sanction for failure to respond to or supplement discovery requests. Apparently, this argument is premised on Rule 37 of the Federal Rules of Civil Procedure. However, "[i]n order to impose sanctions under Rule 37, there must be an order compelling discovery, a willful violation of that order, and prejudice to the other party.'" *Mems v. City of St. Paul*, 327 F.3d 771, 779 (8th Cir. 2003). Raymond has not made the necessary showing here to impose a discovery sanction. Therefore, the court will consider whether the evidence in question should be excluded on evidentiary grounds.

Now that the defendants have clarified that Exhibit 1 to Raymond's motion is the exhibit that Raymond seeks to exclude, Defendants' Trial Exhibit Y (apparently now marked Defendant's Exhibit R owing to revision of the parties' exhibit lists), the court concludes that the exhibit is irrelevant to any issue in this case, even for rebuttal purposes. While the answer to Interrogatory No. 9 is admissible as an admission of a party opponent,

*see Rule v. International Ass’n of Bridge, Structural, and Ornamental Ironworkers, Local Union No. 396*, 568 F.2d 558, 569 n.18 (8th Cir. 1977); *see also* FED. R. EVID. 801(d)(2), and is relevant to the question of whether retaliatory action toward Raymond for filing or pursuing a workers’s compensation claim is an example of “recidivist” conduct, for purposes of punitive damages, *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003), counsel’s correspondence concerning what responses to discovery will be sufficient to preclude burdensome production of documents have no tendency to make any of the issues for which the answer to Interrogatory No. 9 is relevant any more or less probable than it would be without the correspondence. *See* FED. R. CIV. P. 401 (defining relevant evidence); FED. R. EVID. 402 (irrelevant evidence is not admissible). Because the original and supplemental answers to Interrogatory No. 9 address which employees filed workers’ compensation claims and what their current employment statuses are, the correspondence between counsel leading to the supplemental answer is not, by any stretch of the imagination, the other side of the same coin, because it has nothing to do with the workers’ compensation claims or employment statuses of other employees. Moreover, even supposing that the correspondence between counsel has some relevance—and the defendants’ response leaves the court completely at a loss as to what that relevance might be—the limited probative value of that correspondence is substantially outweighed by the potential for unfair prejudice and confusion of the issues. *See* FED. R. EVID. 403 (relevant evidence may be excluded if, *inter alia*, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues). Drawing into the trial of this matter counsels’ correspondence concerning what information should be produced in discovery will simply invite confusion of the jury about the purpose, nature, and manner of discovery and potentially mislead the jury concerning what evidence is actually probative of whether U.S.A. Healthcare has engaged in “recidivist” conduct. Moreover,

putting Raymond's counsel in the position of appearing as a witness, particularly on the eve of trial, is unfairly prejudicial. The court also has no idea what the defendants mean by their assertion that the exhibit concerning the correspondence of counsel has been "marked with the intent of avoiding the unfair prejudice and confusion or misleading the jury feared by Raymond," because there is no indication of what marking has that effect or, indeed, how any unfair prejudice or confusion is dispelled.

Therefore, the plaintiff's May 7, 2007, Third Motion In Limine (docket no. 46) will be granted, and evidence of counsel's correspondence about Interrogatory No. 9 or about discovery concerning personnel who had filed workers' compensation claims will be excluded.

In their May 7, 2007, Motion In Limine Regarding Polygraph Evidence (docket no. 50), the defendants seek to exclude evidence of, reference to, or testimony about any polygraph examination or lie detector test that Raymond took in relation to events underlying this matter. The defendants contend that such evidence is generally inadmissible, at least in the absence of a stipulation of the parties, and that the polygraph evidence in question here is inherently unreliable and otherwise objectionable. Somewhat more specifically, the defendants argue that they requested that Raymond produce all documents that relate to any request by U.S.A. Healthcare or any other entity investigating the morphine shortage at issue in this case to take a lie detector test, but that she has produced only a document now marked as Plaintiff's Exhibit 13. That exhibit, attached to the defendants' brief, is a Notice of Investigative Findings from the Iowa Department of Inspections and Appeals showing that allegations of "exploitation" and "theft" against Raymond were determined to be "unfounded." The defendants also assert that Raymond answered an interrogatory on the same subject, asserting, *inter alia*, that she had a polygraph test on May 5, 2004, at the request of a representative of the Iowa Department

of Inspections and Appeals and a criminal investigator, that she was “cleared of all charges,” and that the test showed “no deceptions” and that “there was no doubt I was being truthful.” The defendants contend that the purported polygraph evidence should be excluded, because there is no stipulation concerning its admissibility. They also argue that evidence of the test or results is otherwise inadmissible, because no expert witness on polygraph examinations has been identified; Exhibit 13 does not identify the questions that Raymond was asked or her answers or the basis for any conclusions about her answers; and Exhibit 13 does not make clear what “charges” were at issue or that Raymond was “cleared” of those charges.

In her May 8, 2007, Resistance To Defendants’ Motion In Limine (docket no. 55), Raymond argues that the defendants’ motion is untimely, because she provided her witness and exhibit lists to the defendants in February in anticipation of the prior trial date, but the defendants made no objection at that time. She also argues that the defendants’ motion in limine is untimely under the March 5, 2007, order resetting the trial for May 14, 2007. Turning to the substance of the motion, Raymond contends that she will be prejudiced by exclusion of this evidence. She explains that she has been prejudiced in her ability to lay a foundation for Exhibit 13 by the defendants’ delay. Although she contends that she does not need to offer the polygraph evidence to prove her innocence of the charge of stealing morphine, she contends that an issue in this case is the defendants’ decision to allow others involved in the incident of the missing morphine to return to work based on actions of the Nursing Board, because the Nursing Board’s investigation included access to polygraphs and other tools to determine whether accusations were founded. In her case, she contends that the defendants intend to offer the Nursing Board’s decision as to charges against her, which is a joint exhibit, and that decision was, in turn, based on the results of the polygraph. Raymond contends, however, that she will offer the polygraph evidence to

offset any suspicion that the jury may have that she took drugs, even though there is no evidence that she took drugs, and the defendants “backed off” their “theft” excuse for terminating her. Raymond contends that the defendants will not be prejudiced, because they are contending that Raymond did not document the missing morphine situation properly, not that she took drugs. Raymond also contends that the polygraph evidence does not suggest that she was fired illegally and she does not intend to argue that it does.

In a Reply (docket no. 57) filed May 8, 2007, the defendants assert that they have simply reiterated in their motion in limine their objections to the polygraph evidence that they raised when the parties were preparing their exhibit lists, so that Raymond is not surprised by their objection to this evidence, and that the court has stated that it will consider the motion, even if it is untimely. The defendants contend that they have filed the motion out of concern that Raymond will testify that she passed a polygraph test, even though such evidence is inadmissible and has never been produced in discovery. They also argue that it has always been Raymond’s burden to lay the foundation for any polygraph evidence, so that it is unclear how Raymond has been “prejudiced” by their conduct in challenging that evidence now.

The Iowa Supreme Court has noted that the results of a polygraph examination are generally inadmissible because the reliability of such examinations has not been adequately demonstrated, *see State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984), although such evidence may be admitted where both parties stipulate to its admission. *In re E.H. III*, 578 N.W.2d 243, 247 (Iowa 1998); *see also In re S.J.M.*, 539 N.W.2d 496, 499 (Iowa Ct. App. 1995) (polygraph evidence is inadmissible unless both parties stipulate to its admissibility). The Eighth Circuit Court of Appeals has, likewise, recognized that “[t]he reliability of polygraph evidence has long been considered suspect, and its admission into evidence is rarely granted.” *United States v. Weekly*, 128 F.3d 1198, 1199 (8th Cir. 1997)

(citations omitted). Moreover, the Eighth Circuit Court of Appeals has recognized that, before polygraph results may be admitted, the party seeking its admission must lay a proper foundation for the district court to determine its reliability. *See United States v. Gianakos*, 415 F.3d 912, 925 n.8 (8th Cir. 2005) (citing *United States v. Greatwalker*, 356 F.3d 908, 912 (8th Cir. 2004), in turn citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-95 (1993)). Where the proponent never establishes or argues that the results of a polygraph are reliable under *Daubert*, the polygraph results are inadmissible. *Greatwalker*, 356 F.3d at 912. Moreover, litigation over polygraph evidence, a “collateral issue,” at best, may distract the jury from the central issues in the case. *See, e.g., United States v. Waters*, 194 F.3d 926, 930 (8th Cir. 1999) (citing *United States v. Scheffer*, 523 U.S. 303 (1998), concerning the “collateral” and “distracting” issues presented by polygraph evidence).

Here, there is certainly no stipulation for admission of the polygraph evidence. *See In re E.H. III*, 578 N.W.2d at 247. Nor has there been anything like an adequate attempt to demonstrate that the polygraph evidence at issue here is reliable or to demonstrate what foundation can be laid for it and, on that basis alone, the evidence could be excluded. *See Greatwalker*, 356 F.3d at 912. In the absence of any showing of reliability or foundation, the court shares with the Iowa Supreme Court and the Eighth Circuit Court of Appeals a suspicion of the reliability of polygraph evidence generally. *See Losee*, 354 N.W.2d at 242; *Weekley*, 128 F.3d at 1199. Moreover, the issues to which Raymond contends that the polygraph evidence is relevant here are, at best, “collateral” to the main question of whether the defendants’ actions were retaliatory, so that there is little reason to indulge in the “collateral” and “distracting” issues of admission of the polygraph evidence. *See Waters*, 194 F.3d at 930. Ultimately, the polygraph evidence that Raymond seeks to admit, even if it could be shown to be reliable and to have an adequate foundation, is at



best marginally probative to “collateral” issues, and that limited probative value is substantially outweighed by the real potential for unfair prejudice and confusion or misleading of the jury. *See* FED. R. EVID. 403 (relevant evidence may be excluded if, *inter alia*, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury).

Therefore, the defendants’ May 7, 2007, Motion In Limine Regarding Polygraph Evidence (docket no. 50) will be granted, and any polygraph evidence or reference to any polygraph of the plaintiff will be excluded.

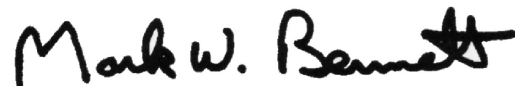
THEREFORE,

1. The plaintiff’s May 7, 2007, Third Motion In Limine (docket no. 46) is **granted**, and evidence of counsel’s correspondence about Interrogatory No. 9 or about discovery concerning personnel who had filed workers’ compensation claims will not be admissible at trial;

2. The defendants’ May 7, 2007, Motion In Limine Regarding Polygraph Evidence (docket no. 50) is **granted**, and any polygraph evidence or reference to any polygraph of the plaintiff will not be admissible at trial.

**IT IS SO ORDERED.**

**DATED** this 9th day of May, 2007.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive, slightly stylized font. The "M" is large and loops around the "a". The "B" is also large and loops around the "e". The signature is positioned above a horizontal line.

MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA